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IN THE

Supreme Court of the United States

October Term, 1972

No. 72-494

ANIELLO DELLA CROCE,

Petitioner,

vs.

PEOPLE OF THE STATE OF NEW YORK,

Respondent.

RESPONDENT'S BRIEF

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Preliminary Statement

This brief is in response to a petition for a writ of certiorari seeking review of a judgment of the Appellate Division, First Department, of the Supreme Court of the State of New York, rendered on April 20, 1972. Leave to appeal to the New York Court of Appeals was denied by Associate Judge Charles D. Breitel on May 24, 1972.

Statement of the Case

Petitioner was indicted for 20 counts of criminal contempt for refusal, after receiving immunity from prosecution, to answer questions before a New York County grand jury which was investigating to determine whether there had been a conspiracy to commit the crimes of bribery, larceny by extortion, coercion, criminal usury and gambling, whether certain corporations had received the proceeds of these criminal activities, and whether the officers and directors of these corporations had conspired to steal the assets of the corporations by appropriating them to the use of other persons. The petitioner, who testified that he had been employed by Royal Crown Bottling Co. in the sales department, was convicted on five counts for refusing to answer questions bearing upon his employment and source of income, and for refusing to testify whether he had told a certain individual something. Prior to submission of the case to the jury, the trial court dismissed the other fifteen counts as repetitious.

During trial the New York *Daily News* published an article (reproduced in Appendix B to the Petition for Certiorari) entitled "Gang War Raging Over Fish Market Switch." Petitioner's photograph appeared with pictures of three other men named in the article. The article did not refer to this case or its subject matter. The next day, defense counsel asked the court to examine each juror to determine the effect of the article (489-90).* A subsequent motion for a mistrial was denied.

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* Numbers in parentheses refer to pages in the Record on Appeal to the Appellate Division of the New York Supreme Court.

Petitioner contended on appeal to the Appellate Division, as he does here, that the trial judge should have questioned the jurors privately, not examined them separately in court in the presence of the rest of the panel. Respondent argued in the Appellate Division, as we do here, that the trial court followed petitioner's suggested procedure, and that the defense never asked the court to examine the jurors privately.

ARGUMENT

There was no violation of due process when the trial court, at petitioner's request, examined the jurors individually in the jury box about a newspaper article that was published during the trial.

The sole question presented on this petition for certiorari is whether the petitioner was denied a fair trial by the manner in which the trial court interrogated the jurors about a newspaper article that referred to petitioner (see petition, p. 2). Petitioner's complaint that he was denied a fair trial by the procedure used to examine the jurors about the article is based on a misreading of the record. He asserts that defense counsel asked to have each of the jurors "privately interrogated" (petition, p. 4), and argues that the court "took over" the defense effort to determine the reactions of the jurors to the article, "and sabotaged the well-meaning efforts by defense counsel to effectively measure the extent of the damage" caused by the article (petition, p. 6). On the contrary, the trial court followed the suggestions of the defense, and defense counsel expressed satisfaction with the method chosen by the court. This is clear from a description of the colloquy.

Defense counsel asked "that each juror be examined individually and not as a body, because I feel that there may be a hesitancy on the part of some of the people on the jury to say that they read it * * *" (489-90). This was not a request to examine each juror "privately" in chambers, at the bench, or in the witness box, but a request to examine each juror individually where they were, in the jury box. When the court asked the jurors collectively whether any of them had read anything recently in connection with this case or the defendant, six jurors and two alternates raised their hands (493-9). Counsel asked, "As long as the jury is in the box, ask each individual juror, those who have read the article, about how they feel about it" (494). The court agreed. Its examination elicited strong statements that the article had nothing to do with the case and would not be considered (494-9).

Counsel then asked that the article be read to the rest of the jurors; the court declined (499-500). This request confirmed that counsel had no intention of asking the court to question the jurors individually in private, a procedure used to prevent exposure of additional jurors to the publicity. The other six jurors indicated that they had not read the article or discussed it with the jurors who had seen it (502-3).

Petitioner then moved for a mistrial because of the nature of the publicity. During his response, the prosecutor pointed out that the court had adopted the procedure suggested by counsel. Defense counsel, instead of disputing this, acknowledged, "your Honor afforded him the utmost fair trial * * *." He contended that a mistrial was required, "even though Your Honor extensively and

meticulously examined the six jurors * * *" (508). Thus, no issue of due process is presented by the procedure adopted by the court to examine the jurors about the newspaper article.

Conclusion

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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Dated: October 20, 1972
New York, New York